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STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANNY WAYNE EVANS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Danny Wayne Evans asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

Appellant Danny Wayne Evans seeks review of that portion of the Court of Appeals, Division II decision filed August 23, 2005, affirming his conviction and holding that the trial court did not err when it denied the defendant's motion to suppress evidence. A copy of the decision of the Court of Appeals is attached.

C. ISSUES PRESENTED FOR REVIEW

When a defendant tells a police officer that (1) he or she does not know the identity of the owner of a briefcase the police officer finds inside the defendant's vehicle during a consensual search, and (2) the defendant refuses to give the officer permission to open or take the briefcase, does the defendant maintain a privacy interest in the briefcase such that the officer's seizure of it violates Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment?

D. STATEMENT OF THE CASE

Factual History

On October 23, 2002, agents from the Cowlitz-Wahkiakum Task Force executed a search warrant at 1101 ½ Cowlitz Way in Kelso, Cowlitz County,

Washington. RP I 50. The building at 1101 ½ Cowlitz Way is a converted garage behind the main residence which bears the number 1101 Cowlitz Way. RP II 60. The defendant Danny Evans owned both the residence and the converted garage although he rented them to Bryan Kerr. *Id.* During the execution of the search warrant, the task force officers found the defendant at the residence and arrested him. RP I 51.

After placing him under arrest, Kelso Police Sergeant Tate asked the defendant for permission to search the defendant's truck, which was parked outside. *Id.* Sgt. Tate explained that the truck was not included in the search warrant and that without permission he could not search it unless he obtained another warrant. RP I 56 - 57. After verifying with Sgt. Tate that he could be present and stop the search at any time, the defendant gave his consent. RP I 59.

At this point, Sergeant Tate took the defendant over to the truck. RP I 59-60. During the search, Sgt. Tate located a locked, silver briefcase on top of a stack of items in the back seat of the vehicle (an extended cab truck). RP I 60-61. Sergeant Tate then asked the Defendant if he had a key to the briefcase. RP I 61. The Defendant did not respond to the question. *Id.* Sergeant Tate then asked if the briefcase belonged to the defendant, who responded that he didn't own it, and that he didn't know who did own it. RP 61. Upon hearing this, Sergeant Tate asked the defendant for permission to

open the briefcase, and the defendant refused, saying that he couldn't give me permission to open the briefcase because it was not his. RP 61. Sergeant Tate then seized the briefcase over the defendant's objection. *Id.*

During the course of the search of the buildings, the task force officers recovered numerous items of evidentiary value. RP II 61-88, 184. Three of these items (two flasks and a condenser tube) had the Defendant's fingerprints on them, although they had no residue of a controlled substance of precursor drug on them. RP II 130, 157. The task force officers also found a container with a bi-layer liquid in it that contained methamphetamine base. RP II 329-30, 352-354.

Two days after the search of the converted garage at 1101 ½ Cowlitz Way, Sergeant Tate had a drug dog smell the briefcase. RP II 184-194. Based upon the drug dog's indication that the briefcase had drugs in it, Sergeant Tate obtained a search warrant to search the briefcase. RP II 184. Inside, Officer Tate found a baggy containing methamphetamine hydrochloride, along with scales and a baggy of red phosphoreus. RP II 344-46.

Procedural History

By Information filed October 28, 2002, the Cowlitz County Prosecutor charged the defendant Danny Wayne Evans with one count of manufacture of a controlled substance and one count of possession of a controlled

substance with intent to deliver. CP 1-2. The defendant thereafter brought a motion to suppress, arguing in part that Officer Tate had illegally seized the briefcase from the defendant. CP 25-36. The defendant further argued that the subsequent search of the briefcase was made pursuant to a warrant issued in reliance upon information the officer obtained as the fruit of his illegal seizure. *Id.* The trial court later denied this motion, and following trial, the jury convicted the defendant on both charges. CP 132-134, 150-158.

After sentencing, the defendant filed timely notice of appeal, and argued in part to the Court of Appeals that the trial court erred when it denied the motion to suppress. CP 159, *see also* Opening Brief of Appellant. The Court of Appeals ruled against the defendant on this point, holding that when the defendant stated that he did not know who was the owner of the briefcase, the police were free to take it as abandoned property. The court held:

We are persuaded by the majority view. When a defendant disavows ownership of an item in response to police questioning, he abandons any privacy interest in that item. Here, when Evans denied (1) ownership of the briefcase, (2) knowledge of the owner, and (3) ability to authorize its opening, he relinquished any expectation of privacy. This constitutes abandonment, regardless of any expectation of privacy in the truck, for which he consented to a limited search.

See Decision of the Court of Appeals, attached.

The defendant now argues that the court erred in this holding and that this court should accept review of this issue.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The case at bar presents a significant question of constitutional magnitude that should be reviewed under RAP 13.4(b)(3). Specifically, this case presents an issue of first impression in the State of Washington on the question whether or not a “denial of ownership coupled with a police enquiry” about an item necessarily constitutes an abandonment of the item, in spite of a defendant’s actual or constructive possession of that item. As the Court of Appeals noted in its opinion, there is a split of opinion among the various states on this question. The following examines some of those cases finding no abandonment.

In *Robles v. State*, 510 N.E.2d 660 (Ind. 1987), the court held that a defendant’s statement that the bag he checked in with the airline was not his did not constitute abandonment; he still had a reasonable expectation of privacy as the person transporting the bag. *Id.* Similarly, in *State v. Casey*, 59 N.C.App. 99, 296 S.E.2d 473 (1982), the court held that the defendant’s statement that the bags he was carrying in the airport were not his did not constitute abandonment because he had actual possession and control of the bags. *Id.* Similarly, in *State v. Huether*, 453 N.W.2d 778 (N.D.1990), the defendant was not found to have abandoned a bag containing controlled substances where he denied both ownership of the bag and knowledge of its contents. *Id.* The court found that the absence of abandonment was

especially apparent where, as here, the paper bag was contained and controlled within an area where the accused has a legitimate expectation of privacy. *Id.*

One Washington case that touches upon this issue is *State v. Goodman*, 42 Wn.App. 331, 711 P.2d 1057 (1985). In that case, officers searched a defendant's trunk, and in doing so, asked the defendant about a suitcase they found inside. *Goodman*, at 333. Goodman first denied knowing anything about the suitcase, and then said it belonged to his passenger. *Id.* When officers asked the passenger about the suitcase, he also denied knowing about it and then said that he found it along the roadway and was trying to find the owner. *Id.* After finding that Goodman had standing to challenge the officer's eventual search of the suitcase, the court also noted, without further analysis, that "the State's assertions of voluntary abandonment" was "without factual support." *Goodman*, at 335. While arguably dictum, this conclusion clearly shows allegiance with the jurisprudence described above.

In making the claims in this case, the defendant argued a violation of both Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. When a violation of both federal and state constitutions is alleged, the state constitutional claim should be examined first. *Munns v. Martin*, 131 Wn.2d 192, 930 P.2d 318 (1997). In order to enable courts to

determine whether greater protection under the state constitution is warranted in a particular case, this court has established six nonexclusive criteria. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). If these criteria are present, a court must decide the case on independent state constitutional grounds, which afford more protection to individuals from searches and seizures by government than the Fourth Amendment to the United States Constitution. *See State v. Carter*, 127 Wn.2d 836, 904 P.2d 290 (1995); *see also State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). Since *Gunwall* involved comparing the same constitutional provisions as those to be examined here (Washington Constitution, Article 1, § 7), it is only necessary to examine the fourth and sixth *Gunwall* factors as they apply to this case. *Boland*, 115 Wn.2d at 576-77.

The fourth *Gunwall* factor is whether or not “preexisting bodies of law, including statutory law” militate toward a conclusions that greater protection was intended under the state constitution. *Gunwall*, 106 Wn.2d at 61-62. A person’s right to be free from unreasonable governmental intrusion into one’s private affairs encompasses automobiles and their contents. *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). Moreover, as the cases cited above from North Carolina, North Dakota, and Indiana point out, there is already a body of case law finding that a denial of ownership does not constitute abandonment particularly when a person has actual possession of

the item, or the item is found in an area where the defendant maintains an expectation of privacy. Indeed, it would be anomalous for this court to conclude that the citizens of Washington have less protection under Washington Constitution, Article 1, § 7 than a number of jurisdictions have found that their citizens have under the Fourth Amendment.

In addition, this court's repeated application of the principle of automatic standing in the face of the federal courts' abandonment of the principle also constitutes a body of case law that supports a conclusion that Washington Constitution, Article 1, § 7 recognizes a privacy interest in all property that a defendant either actually or constructively possesses, even if the defendant disavows knowledge of the true owner of that property. *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714 (2000) (Washington still adheres to the principle of automatic standing). Thus, the fourth *Gunwall* factor supports the conclusion that Washington Constitution, Article 1, § 7 provides more privacy protection in property a defendant either actually or constructively possesses regardless of who the true owner of the property is.

The sixth *Gunwall* factor militates towards finding a state constitutional protection in excess of that existent under the federal constitution if the issue before the court involves "matters of particular state or local concern." *Gunwall*, 106 Wn.2d at 61-62. The question under this factor becomes: Is the subject matter local in character, or does there appear

to be a need for national uniformity? In *State v. Johnson, supra*, the court held that privacy interests protected by Article 1, § 7 include “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Mendez*, 137 Wn.2d 208, 217, 970 P.2d 722 (1999) (the sixth Gunwall factor leads to the conclusion that Washington Constitution, Article 1, § 7 provides greater protection to privacy than the Fourth Amendment). Thus, our courts have held that Washington law recognizes a particularized interest in the privacy interest of its citizens well beyond that found at the national level. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998)

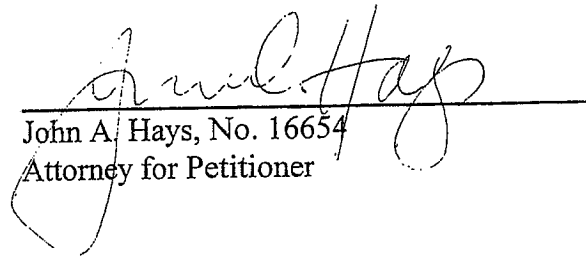
Since it has long been held that Article 1, § 7 provides greater protection of a person’s right to privacy than the Fourth Amendment, this court should accept review of this case, and then hold that under Washington Constitution, Article 1, § 7 a denial of ownership of an item the police find in a defendant’s actual or constructive possession is not an abandonment of that property.

F. CONCLUSION

For the reasons stated herein, the defendant respectfully requests that this court accept review in this case and reverse the decision of the Court of Appeals.

DATED this 19th day of SEPTEMBER, 2005.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

Appendix

WASHINGTON CONSTITUTION ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

UNITED STATES CONSTITUTION, FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

No. 31451-7-II

Respondent,

v.

DANNY WAYNE EVANS,

PUBLISHED OPINION

Appellant.

HOUGHTON, J. -- A jury convicted Danny Evans of manufacturing methamphetamine and unlawful possession of methamphetamine with intent to deliver. He appeals, arguing that the trial court erred when it (1) denied his motion for a *Franks*¹ hearing, (2) determined that denial of ownership constitutes abandonment, and (3) sentenced him under former RCW 69.50.401(a)(1)(ii) (2002). He further argues that the prosecutor elicited a comment on his exercise of his right to remain silent. We affirm the conviction, but vacate the sentence and remand for resentencing.

¹ *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) (stating that the court must hold an evidentiary hearing when the defendant makes a substantial preliminary showing that the affiant knowingly, intentionally, or with reckless disregard for the truth included in his affidavit a false statement that was necessary to the finding of probable cause).

FACTS

On October 23, 2002, police officers arrested Gary Lindsey for second degree attempted burglary. In exchange for leniency, Lindsey offered information about Evans, his methamphetamine dealer.

Detective Michael Cowan filed an affidavit, requesting a search warrant for a home and detached structure at 1101 Cowlitz Way. He also requested a search warrant for Evans, the property's owner.

The affidavit described Lindsey's interactions with Evans:

Lindsey told me he has purchased crystal methamphetamine from a Dan Evans and "Scott" [an accomplice] who "cook", manufacture methamphetamine using the "red-P" method in a small . . . dwelling/structure located behind Evans' residence at 1101 Cowlitz Way. . . . Lindsey told me that on the evening of 10/21/2002 he went to this dwelling/structure behind 1101 Cowlitz Way to purchase methamphetamine. He contacted Scott at the dwelling and purchased \$20 worth of methamphetamine. During this contact Lindsey asked to use the bathroom. Scott let Lindsey into the dwelling/structure to use the bathroom. Lindsey said he observed 4-5 metal cans he thought contained "Acetone", 3-4 off green in color "Ball" Mason jars of the quart size. He said he had supplied these jars to Evans earlier. Lindsey described the jars as having a clear to yellowish liquid into [sic] them. Lindsey said one of the jars had [two] separate layers of an unknown liquid inside. Lindsey stated Scott was boiling an unknown substance that "looked like water" in [a] Corning cook ware [sic] sauce pan "breaking pills down" which he pulled out of the stove. Lindsey stated he saw a dark red in color substance in coffee filters and a jar.

Clerk's Papers (CP) at 118.

Further, Cowan explained that "Lindsey is aware that if the information provided is not correct, he will not receive leniency for his pending felony charge." CP at 119. He also indicated that Lindsey's information corroborated his investigation on other charges. But he did not list Lindsey's prior convictions for six counts of forgery and two counts of second degree theft.

Task Force members executed the warrants at 1101 Cowlitz Way, where they observed a residence and a detached, converted garage.

When entering the residence, the police detected a noticeable chemical odor. The police arrested Evans as he left the residence and then placed him in a patrol car. Cowan read him the *Miranda*² advisements.

Officers discovered evidence of methamphetamine production in the garage. They found a hot plate, gas mask, filters, Red Devil lye, butane, a bag of flares, and a condenser tube hose. Testing revealed Evans's fingerprints on two flasks and a condenser tube. The officers also recovered a container with layers of clear, colorless liquids. Later tests confirmed that the item contained methamphetamine base.

Bryan Kerr was present during the search. Officers learned that Kerr rented the residence. In his interview with Sergeant Kevin Tate, Kerr explained that Evans generally carried a briefcase.³ Tate "had the impression that this [briefcase] was part of the business that Dan Evans was involved in," specifically, the "[m]ethamphetamine drug dealing business." Report of Proceedings (RP) (Taped) at 53.

Tate observed a truck parked in the driveway. Inside, he saw the briefcase Kerr described. Evans was the truck's registered owner. After confirming that Evans had been given *Miranda* warnings, Tate began interviewing him. Evans stated that "[I don't] want to talk about

² *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (holding that custodial statements are inadmissible unless officers warn the individual of the following: (1) he has the right to remain silent, (2) any statement may be used against him, (3) he has the right to an attorney, and (4) he may waive those rights).

³ This information comes from Tate's suppression hearing testimony. Kerr did not testify at the hearing. But in his trial testimony, Kerr vehemently denied making this statement.

any details. . . . [T]he police are gonna do what the police are gonna do, and I don't want to talk about it."⁴ RP (Taped) at 56.

Tate then asked permission to search the truck. He explained that the truck was not included in the search warrant but that Evans could give consent. Evans asked what Tate wanted to search. Tate stated that he wanted to "search the passenger compartment of the car." RP (Taped) at 58. Evans gave Tate consent to perform a "limited search" of the truck, provided that he could be present. RP (Taped) at 59.

In the back seat of the truck, Tate saw the briefcase. It was locked. He asked whether the briefcase belonged to Evans and whether he had a key. Evans stated that he did not own the briefcase, that he did not know the owner, and that he could not give permission to open the briefcase because it did not belong to him.

Tate seized the briefcase, telling Evans that he would apply for a search warrant. Evans objected, saying, "I don't want you to do that. I didn't give you permission for that." RP (Taped) at 62-63. Tate then stopped searching the truck.

After a drug-sniffing dog gave a positive "hit" on the briefcase, Tate obtained a search warrant. Inside, he found a bank foreclosure notice for the residence at 1101 Cowlitz Way, red phosphorous, and scales. The briefcase also contained a white crystal substance, later identified as methamphetamine hydrochloride.

The State charged Evans with manufacture of methamphetamine (count I) and unlawful possession of methamphetamine with intent to deliver (count II).

⁴ At a CrR 3.5 hearing, the court determined that the police advised Evans of his rights, he understood and selectively exercised those rights, and police honored his choices. Thus, it ruled admissible all relevant statements.

Evans moved to suppress the evidence found in the briefcase. He also filed a motion to suppress all evidence obtained through the search warrant, arguing that the supporting affidavit did not meet the *Aguilar-Spinelli*⁵ reliability prong. He then moved for a *Franks* hearing, claiming that the affiant deliberately omitted material facts regarding Lindsey's prior convictions for crimes of dishonesty. The court denied the motions.

At trial, Tate testified that Evans received *Miranda* warnings. Then the prosecutor and Tate discussed Evans's further questioning and his responses.

Outside the jury's presence, Evans moved for dismissal without prejudice or a mistrial, claiming that the prosecutor solicited a comment on Evans's exercise of his right to remain silent. The trial court denied the motion.

The jury convicted Evans of manufacturing methamphetamine "as charged in Count I" and of unlawful possession of methamphetamine with intent to deliver "as charged in Count II." Count I charged him with manufacturing methamphetamine "contrary to [former] RCW 69.50.401(a)(1)," and count II charged him with possession of methamphetamine with intent to deliver "contrary to [former] RCW 69.50.401(a)." CP at 1, 2.

In a posttrial motion, Evans (1) renewed his two motions to suppress, (2) asked the court to treat the two counts as the same criminal conduct in sentencing, and (3) argued that the court

⁵ This test derives from two United States Supreme Court cases: *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Although the United States Supreme Court has rejected the *Aguilar-Spinelli* test for the "totality-of-the-circumstances" test, *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), Washington courts adhere to *Aguilar-Spinelli*. *State v. Gaddy*, 152 Wn.2d 64, 71 n.2, 93 P.3d 872 (2004). Under the *Aguilar-Spinelli* test, an affidavit establishes probable cause if it sets forth the informant's basis of knowledge and veracity. *Gaddy*, 152 Wn.2d at 71.

could not sentence him under former RCW 69.50.401(a)(1)(ii) because the jury verdict did not specifically identify the unlawful substance.

The trial court denied the renewed motions to suppress. It then determined that the two counts were the same criminal conduct. It sentenced Evans to 60 months, a term within his standard range.⁶

He appeals.

ANALYSIS

I. *Franks* Hearing

Evans first contends that the trial court erred when it denied his motion for a *Franks* hearing. He asserts that Cowan recklessly omitted a material fact, Lindsey's prior convictions for crimes of dishonesty. He argues that these prior convictions were material because they undercut the indicia of reliability required by *Aguilar-Spinelli*.

At the defendant's request, the court must hold a *Franks* hearing if the defendant makes a preliminary showing that the affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to a finding of probable cause. 438 U.S. at 155-56; *State v. Vickers*, 148 Wn.2d 91, 114, 59 P.3d 58 (2002). The *Franks* rule extends to material omissions. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992).

“‘[A]llegations of negligence or innocent mistake are insufficient.’” *Garrison*, 118 Wn.2d at 872 (quoting *Franks*, 438 U.S. at 171). Rather, the defendant must support the

⁶ The judgment and sentence does not explicitly state whether the trial court sentenced Evans under former RCW 69.50.401(a)(1)(ii) or (iii). But its calculation of Evans's standard range indicates that it sentenced him under subsection (ii).

allegations with an offer of proof. *Garrison*, 118 Wn.2d at 872. If the defendant makes the requisite preliminary showing and establishes the allegations at the hearing by a preponderance of the evidence, the trial court includes the omitted material in the affidavit to determine whether it supports a finding of probable cause. *State v. Chenoweth*, 127 Wn. App. 444, 111 P.3d 1217, 1223 (2005). If the modified affidavit fails to support probable cause, the search warrant is invalid and all evidence obtained through the warrant is excluded. *Chenoweth*, 111 P.3d at 1223-24.

In his motion for a *Franks* hearing, Evans asserted that Cowan “chose to omit” Lindsey’s prior convictions for six counts of forgery and two counts of second degree theft. CP at 27. Additionally, he claimed the following:

Herein we have established that specific omissions of fact have been made by the police in the application for this search warrant. Lindsey at the same time that he was being vouched for to the magistrate as a credible and reliable source was known to the police and the Prosecuting Attorney of this county as a repeatedly convicted thief. He was known to the police and the prosecuting attorney to be actively stained by findings of criminal falsehood.

CP at 45.

The trial court denied this motion, explaining that Evans failed to make the requisite preliminary showing:

Some of the matters raised by the defense might negate probable cause. Both the informant’s criminal history and pending CCSO investigation (by Deputy Merkle) are relevant to the probable cause inquiry. However, while counsel presents a persuasive argument that Officer [sic] Cowan . . . could have known and maybe should have known of these matters, the offers of proof do not rise to the level of intentional or reckless disregard. While a defendant’s criminal history is always available to the police and prosecutors, it is not *per se* reckless not to run that criminal history (NCIC) and to fail to present it to the magistrate.

CP at 53. Further, the trial court ruled that even if Evans had met the preliminary showing, his argument would still fail:

[T]his Court does not find that any of the omitted information was “necessary” to probable cause [sic]. Stated differently, even had the information been included in the affidavit, the affidavit information would have been sufficient to establish probable cause. The magistrate was aware that the informant had been involved in criminal activity and was seeking leniency. In addition, any informant who personally observed and even assisted in the manufacturing of methamphetamine would have had close ties to the drug world and would most likely have a criminal history. The informant’s criminal history cuts both ways and cannot be said to vitiate probable cause.

CP at 53-54.

Here, Evans argues that Cowan “chose to omit” information regarding Lindsey’s reliability. As the trial court correctly noted, while Cowan “could have known and maybe should have known” of Lindsey’s criminal history, “the offers of proof do not rise to the level of intentional or reckless disregard.” CP at 53. At most, Evans’s assertions support a finding of negligence. But allegations of negligence fail to meet the preliminary showing. *Garrison*, 118 Wn.2d at 872. Accordingly, the trial court properly denied Evans’s motion for a *Franks* hearing.

II. Abandonment

Evans next contends that the trial court improperly denied his motion to suppress the evidence found in the briefcase.⁷

After a suppression hearing, we examine whether substantial evidence supports the trial court’s challenged findings of fact and, in turn, whether the findings support the conclusions of

⁷ The trial court ruled that Evans had automatic standing to challenge the seizure. Because it failed to provide argument or citation to authority, the State appears to concede this issue. See RAP 10.3(a)(5), (b) (respondent’s brief must contain “argument in support of the issues presented for review, together with citations to legal authority”). Regardless, we agree with the trial court that Evans has automatic standing. See *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) (to claim automatic standing, the defendant must be (1) charged with an offense that involves possession as an essential element; and (2) in possession of the item at the time of the challenged search or seizure).

law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025 (2003). We treat unchallenged findings of fact as verities on appeal, we and review conclusions of law de novo. *State v. Stevenson*, ___ Wn. App. ___, 114 P.3d 699, 706 (2005).

Here, Evans did not assign error to any finding of fact. Instead, he challenges the trial court's legal conclusion that his denial of ownership constituted abandonment, allowing the officer to seize the briefcase.

The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures." Article I, section 7 of the Washington Constitution guards against unlawful searches and seizures, providing greater protection than the Fourth Amendment. *State v. Hendrickson*, 129 Wn.2d 61, 69-70 n.1, 917 P.2d 563 (1996). Constitutional protections do not extend to abandoned property unless the abandonment is the product of police coercion or other unlawful police action. 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(b), at 670, 683 (4th ed. 2004); *see also State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001).

Washington courts have examined the abandonment doctrine. *See e.g. Reynolds*, 144 Wn.2d at 287 (officers may search voluntarily abandoned property without raising constitutional concerns). But our courts have not analyzed whether one can disclaim property but still challenge a later search, where the disclaimed property remained in an area where one has a reasonable expectation of privacy.⁸

⁸ Here, this area is the truck.

Other jurisdictions are split on this issue. The majority of courts have held that a person abandons the property with a disclaimer of ownership made in response to a police inquiry.⁹

For example, in *State v. Huffman*, 169 Ariz. 465, 820 P.2d 329, 331 (1991), the Arizona Supreme Court held that “denial of ownership, when questioned [by police], constitutes abandonment.” A police officer recognized Huffman, who had an outstanding arrest warrant, as Huffman rode in a in a car. *Huffman*, 820 P.2d at 330. After obtaining the driver’s consent to search the car, an officer found a key to the Willow Motel. *Huffman*, 820 P.2d at 330. Both Huffman and the driver denied ownership of the key. *Huffman*, 820 P.2d at 330. In the motel room, the police found cocaine and other drug paraphernalia. *Huffman*, 820 P.2d at 330.

The Arizona Supreme Court held that Huffman “denied any interest in the key to the motel room, thereby relinquishing any expectation of privacy.” *Huffman*, 820 P.2d at 330. It noted that denial of ownership, coupled with police inquiry, constitutes abandonment. *Huffman*, 820 P.2d at 331.

In contrast, other jurisdictions have determined that denial of ownership, in response to police inquiry, is not abandonment.¹⁰ For example, in *State v. Huether*, 453 N.W.2d 778, 780

⁹ See, e.g., *Nation v. State*, 252 Ga. App. 620, 556 S.E.2d 196 (2001) (when defendant denied ownership of the item searched, he had no legitimate expectation of privacy in the item); *State v. Zaitseva*, 135 Idaho 11, 13 P.3d 338 (2000) (passenger denied ownership of a bag after police inquiry, thereby abandoning her reasonable expectation of privacy); *People v. Williams*, 223 A.D. 745, 637 N.Y.S.2d 465 (1996) (when defendant disavowed ownership of a bag, he abandoned the item); *State v. Linville*, 190 Or. App. 185, 78 P.3d 136 (2003) (where police lawfully stopped vehicle and questioned passenger about ownership of cigarette packet, passenger’s denial of ownership constituted abandonment).

¹⁰ See, e.g., *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982) (airline passenger who denied ownership of bag in response to police questioning retained a reasonable expectation of privacy); *People v. Cameron*, 73 Misc.2d 790, 342 N.Y.S.2d 773 (1973) (denial of ownership is not proof of intent to abandon).

(N.D. 1990), an officer stopped Huether for speeding and detected the odor of alcohol. Huether consented to the officer's search for open containers. *Huether*, 453 N.W.2d at 780. The officer saw a small paper bag pushed partly under the front seat. *Huether*, 453 N.W.2d at 780. Later tests confirmed that the bag contained amphetamine hydrochloride, a controlled substance. *Huether*, 453 N.W.2d at 780. Huether denied ownership of the bag and knowledge of its contents. *Huether*, 453 N.W.2d at 780. The North Dakota Supreme Court held that Huether did not abandon his reasonable expectation of privacy when he disclaimed ownership. *Huether*, 453 N.W.2d at 781-82.

Evans cites a case from our court to support his contention. In *State v. Goodman*, a police officer observed two suspicious men drive down the street, stop, turn off the lights, and open the trunk. 42 Wn. App. 331, 333, 711 P.2d 1057 (1985), *review denied*, 105 Wn.2d 1012 (1986). One man exited the car and returned with a suitcase, placing it in the trunk. *Goodman*, 42 Wn. App. at 333. The officer stopped the vehicle and asked about the suitcase. *Goodman*, 42 Wn. App. at 333. Both men denied ownership. *Goodman*, 42 Wn. App. at 333.

When examining whether the defendant had standing, this court noted that the "State's assertions of voluntary abandonment . . . are without factual support." *Goodman*, 42 Wn. App. at 335. The *Goodman* court did not face the issue before us and its comments regarding abandonment are dicta.

We are persuaded by the majority view. When a defendant disavows ownership of an item in response to police questioning, he abandons any privacy interest in that item. Here, when Evans denied (1) ownership of the briefcase, (2) knowledge of the owner, and (3) ability to authorize its opening, he relinquished any expectation of privacy. This constitutes abandonment,

regardless of any expectation of privacy in the truck, for which he consented to a limited search.¹¹

III. Comment on the Right to Remain Silent

Evans further contends that the State violated his right to remain silent when it elicited testimony regarding his exercise of this right.

The Fifth Amendment of the United States Constitution states, in part, that no person “shall be compelled in any criminal case to be a witness against himself.” In a similar provision, article I, section 9 of the Washington Constitution reads: “[n]o person shall be compelled in any criminal case to give evidence against himself.” Washington courts give the same interpretation to both clauses. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

The right to remain silent applies in both pre- and post-arrest situations. *Easter*, 130 Wn.2d at 243. The State cannot portray the exercise of this right as substantive evidence of guilt. *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002).

Accordingly, the State cannot seek comments on a defendant’s silence to infer guilt. *Easter*, 130 Wn.2d at 236. “A comment on an accused’s silence occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Subject to the rules of evidence, introduction of nontestimonial evidence such as demeanor and conduct is proper. *Easter*, 130 Wn.2d at 243. And “a mere reference to silence which is not a ‘comment’ on the silence is not reversible error absent a showing of prejudice.” *Lewis*, 130 Wn.2d at 706-07.

¹¹ Moreover, we note that the officers obtained a search warrant before opening the briefcase.

At trial, Tate testified about his interview with Evans. He explained that Evans received the *Miranda* advisements. The prosecutor then asked Tate the following questions:

- Q . . . [D]id you ask Mr. Evans . . . any questions regarding [a] clandestine methamphetamine lab?
- A Yeah, I started to ask some of those questions. I asked about, "You know, we're processing a lab here, . . . do you want to talk to me about that?" I asked some of those type questions. I also asked about knowledge issues.
- Q Okay. What . . . exactly did he tell you with respect to . . . [the] search that was being conducted at that time?
- A . . . [H]e didn't answer specifically . . . about those other than to say we're going to do what we're going to do.
- Q Okay.
- A Meaning police, you know, you guys are going to do . . . what we're going to do.

II RP (Trial) at 178.

Defense counsel lodged a timely objection. Outside the jury's presence, he moved for dismissal without prejudice or a mistrial. The court took the matter under advisement, stating, "I was quite surprised at the direct examination of Sgt. Tate as it relates to what the defendant said because Sgt. Tate said essentially -- . . . I mean, there were red flags for me as soon as the question was asked -- essentially said he didn't answer questions." II RP (Trial) at 216-17.

In an oral ruling, however, the trial court denied the motion. After reviewing the transcript, the court explained, "the wording is key. He didn't answer that question specifically, he said, X. That is different than saying: He didn't answer the question. I think it is different enough to avoid the problem." III RP (Trial) at 295. We agree with the trial court.

Here, Tate's testimony does not amount to a comment on the exercise of the right to remain silent. Tate did not testify that Evans refused to answer questions. Rather, he stated that Evans merely said, "you guys are going to do . . . what we're going to do." II RP (Trial) at 178.

Although this may portray Evans as recalcitrant, the State did not use the statement as substantive evidence of guilt. Evans's argument fails.

IV. Former RCW 69.50.401

Finally, Evans contends that the trial court erroneously sentenced him under former RCW 69.50.401(a)(1)(ii),¹² where the verdict did not specifically identify the controlled substance. He further argues that when the trial court, rather than the jury, identified the controlled substance for sentencing purposes, it violated his right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Former RCW 69.50.401 provides, in relevant part:

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture . . . or possess with intent to . . . deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

. . . .

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisonment for not more than ten years

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years.

¹² Recently, the Legislature significantly amended RCW 69.50.401. Effective July 24, 2005, the statute reads, in relevant part:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

. . . .

(b) Amphetamine, including its salts, isomers, and salts of isomers, or *methamphetamine, including its salts, isomers, and salts of isomers*, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW; RCW 69.50.401 (emphasis added).

We recently addressed interpretation of former RCW 69.50.401(a)(1)(ii) and (iii) in *State v. Morris*, 123 Wn. App. 467, 472-73, 98 P.3d 513 (2004). There, we held that the language of former RCW 69.50.401(a)(1)(ii) is “unambiguous,” such that “its prohibition only covers methamphetamine in its pure form, its base” and not “methamphetamine hydrochloride.” *Morris*, 123 Wn. App. at 474; *cf. State v. Cromwell*, ___ Wn. App. ___, 112 P.3d 1273, 1275 (2005) (Division One opinion disagreeing with *Morris*, concluding that “the Legislature intended to penalize the possession with intent to deliver . . . of . . . methamphetamine in *any* form more harshly than the possession with intent and delivery of any other controlled substances listed in the Schedules”).

Our Supreme Court addressed a similar issue in *State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004), a case that pre-dates the *Blakely* decision. By amended information, the State charged Goodman with “‘possess[ion of] a controlled substance with intent to deliver, to wit: meth.’” *Goodman*, 150 Wn.2d at 779 (quoting *Goodman* CP at 26). On appeal, Goodman claimed that the amended information lacked an essential element, the identity of the controlled substance. *Goodman*, 150 Wn.2d at 784, 786.

Citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000),¹³ the Court held that “the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant.”¹⁴ *Goodman*, 150 Wn.2d at 785-86.

¹³ In *Apprendi*, the United States Supreme Court held that “any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490.

¹⁴ Goodman challenged the adequacy of the charging document for the first time on appeal. *Goodman*, 150 Wn.2d at 787. Because the necessary facts appeared in the charging document

This conclusion comports with the United States Supreme Court's holding in *Blakely*. As defined in *Blakely*, the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. ____, 124 S. Ct. at 2537 (emphasis omitted).

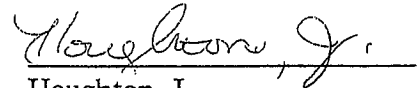
Here, the State introduced evidence of the methamphetamine base found in the garage and methamphetamine hydrochloride found in the briefcase. But the verdict forms did not ask the jury to identify the particular substance underlying the convictions. Rather, the jury convicted Evans of manufacturing methamphetamine "as charged in Count I" and of possession of methamphetamine with intent to deliver "as charged in Count II." But count I charged him with manufacturing methamphetamine "contrary to [former] RCW 69.50.401(a)(1)" and count II charged him with possession of methamphetamine with intent to deliver "contrary to [former] RCW 69.50.401(a)."

We cannot discern whether the jury premised the convictions on methamphetamine base, methamphetamine hydrochloride, or both substances. Under *Blakely*, the trial court invaded the province of the jury when it sentenced Evans under former RCW 69.50.401(a)(1)(ii) because this necessarily involves a factual finding that Evans manufactured and unlawfully possessed methamphetamine *base* with intent to deliver.¹⁵ Accordingly, we vacate Evans's sentence and remand for resentencing.

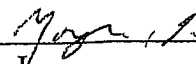
and because Goodman suffered no actual prejudice, the Court affirmed his conviction. *Goodman*, 150 Wn.2d at 790.

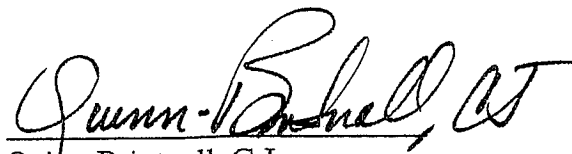
¹⁵ The trial court sentenced Evans to 60 months, a term within the statutory maximum for purposes of former RCW 69.50.401(a)(1)(iii). But when convicted under subsection (iii), Evans's standard range changes.

In sum, we affirm the conviction, but vacate the sentence and remand for resentencing.


Houghton, J.

We concur:


Morgan, J.


Quinn-Brintnall, C.J.

For both charges, Evans had an offender score of zero and a seriousness level of VI. *See* former RCW 9.94A.515 (2002) (classifying the “[m]anufacture . . . or possess[ion] with intent to deliver narcotics from Schedule I or II” as a crime with a seriousness level of VI); RCW 69.50.206(d)(2) (classifying “[m]ethamphetamine, its salts, isomers, and salts of its isomers” as Schedule II drugs). Accordingly, Evans has a standard range of 12 to 14 months. RCW 9.94A.510. The imposition of a 60 month sentence violates Evans’s Sixth Amendment right to a jury trial.